

Society to Advance the Retarded and Handicapped, Inc. and New England Health Care Employees Union, District 1199, AFL-CIO. Case 34-CA-6883

August 22, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The issue presented in this case is whether the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Jon Gibbons.¹ The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions only to the extent consistent with this Decision and Order.³

It is undisputed that allegations of sexual harassment and intimidation against Gibbons triggered the Respondent's investigation that culminated in his discharge. The judge, however, inferred that during this investigation the Respondent discovered that Gibbons had engaged in certain union activity and that this activity became a motivating factor in its decision to discharge Gibbons. The judge therefore concluded that the discharge violated Section 8(a)(3) and (1) of the Act. We disagree. For the reasons set forth below, we find that the General Counsel has failed to present sufficient evidence to warrant the inference that the Respondent knew of Gibbons' union activity or that its actions were motivated by hostility to such activity.

In late October 1994,⁴ Gibbons and fellow employees Bill Legere and Shawn Weeks spoke to a few of their coworkers about union representation. These conversations were admittedly limited and deliberately concealed from management. Gibbons and Legere

spoke to employee Kathy Fedor about the Union during a local bar's "happy hour" on November 10. In mid-December, Gibbons and Legere agreed to postpone any further efforts at unionization until after a scheduled Christmas shutdown.

On December 21, because of a comment by Angelina Moniz at the Respondent's Christmas party, Director of Employment Services Kari Ryan questioned employees concerning Gibbons' behavior in the workshop. Moniz told Ryan that Gibbons had created the impression that he was her supervisor, but that 6 months earlier she had complained to the Workshop Supervisor Dale Allen and learned that Gibbons was not her supervisor. Moniz also told Ryan that Gibbons picked on her, tried to get her to go out with him, and made her "uncomfortable" at a happy hour. At Moniz' suggestion, Ryan spoke with Kathy Fedor who complained that Gibbons made sexual advances to her at the November 10 happy hour. Fedor also complained that Gibbons told her he was the supervisor of the workshop. Although she later learned from Moniz that Gibbons was not her supervisor, Fedor told Ryan that she believed he was at the November 10 happy hour.

Gibbons' supervisor, Dale Allen, told Ryan that the only complaint about Gibbons he knew of was Moniz' complaint that Gibbons had represented himself as her supervisor and for which Gibbons had been orally reprimanded. Ryan spoke with two other women in the workshop. Kathy Drucker stated that Gibbons asked her out, tried to pass himself off as her supervisor, and spread false gossip, but he had never made sexual advances. Jennifer Brown told Ryan she knew who her supervisor was and that she had never been intimidated or made to feel uncomfortable by anyone at work. On December 23, the last workday before the Christmas shutdown, Ryan summarized these interviews in a report to Director of Personnel Irene Curtin, and expressed her "concern" that Gibbons intimidated three women and misrepresented himself as a supervisor. She recommended only that "action be taken."

On January 3, 1995, following the Christmas shutdown, Curtin reinterviewed Moniz and Fedor, asking them to verify what was written in Ryan's report. Both women added incidents of a sexual nature to the report. Curtin did not interview Gibbons, Allen, or any other workshop employee. On January 4, 1995, Curtin called Gibbons, who was home sick, and told him to come to work or he would be suspended without pay. Gibbons met with Curtin and Allen.⁵ Curtin told Gibbons that there were complaints about his behavior, that some of the complaints concerned alleged sexual harassment, and that he would be terminated unless he chose to resign. Curtin refused to tell Gibbons who his

¹ On June 26, 1996, Administrative Law Judge David S. Davidson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We deny the Respondent's motion to reopen the record to admit into evidence a complaint filed by alleged discriminatee Jon Gibbons with the Connecticut Commission on Human Rights and Opportunities alleging gender discrimination as the basis for his discharge. Assuming, without deciding, that such a document would be entitled to some weight in resolving the unfair labor practice allegation here, the Respondent has failed to explain why it delayed over a year from receipt of this complaint to move for its admission. See *Central Broadcast Co.*, 280 NLRB 501 fn. 1 (1986). In any event, in view of our dismissal of the complaint, the Respondent's motion is moot.

⁴ Unless otherwise specified, all dates hereinafter are in 1994.

⁵ Ryan was on vacation and not scheduled to return until the following week.

accusers were or what they had said. Gibbons refused to resign and Curtin handed him a termination slip and final paycheck that had been prepared in advance. Following his discharge, Gibbons picketed outside the facility. After the charge was filed in this case alleging that Gibbons had been discharged because of his union activity, the Respondent distributed a memo to employees advising them that: a charge had been filed; that this was usually a signal of an organizing drive; management did not believe there was a need for a union; and employees had the right not to sign cards and to reclaim cards which had been signed.⁶

The judge concluded that these facts established an 8(a)(3) violation in the absence of direct evidence of knowledge or animus by relying on a series of inferences. Noting Gibbons' exemplary work record, the judge first inferred, from the Respondent's decision to discharge Gibbons without confronting him, identifying his accusers, seeking his version or explanation, or speaking to other employees present during incidents alleged by Moniz and Fedor, that the reasons offered by the Respondent were not the real reasons for his discharge. Although we agree that, having discredited the Respondent's explanations for its actions, the judge is entitled to infer there is another reason, we note that "it does not necessarily follow that the real reason was grounded in antiunion animus." *Precision Industries*, 320 NLRB 661 (1996). In this regard, we find the judge's reliance on the postdischarge memo to employees misplaced. We agree with the judge that the memo, although it is not alleged as a violation of the Act, does constitute evidence that the Respondent was opposed to union representation and sought actively to discourage its employees from supporting the Union. It does not necessarily follow, however that the memo is evidence that the Respondent was motivated by antiunion animus in its discharge of Gibbons. In the circumstances of this case, where there is no other evidence of animus or unlawful conduct, and no direct evidence that the Respondent knew of union activity on the part of Gibbons or among any of its employees, we are not willing to infer an antiunion motivation based on this single, postdischarge statement of opposition to unionization.

Conceding the lack of direct evidence that the Respondent knew of any union activity among its employees, the judge next inferred that either Moniz or Fedor told Curtin of Gibbons' union activity during their interviews on January 3. The judge supported this inference by noting: that both Moniz and Fedor knew of Gibbons' union activity; that Gibbons had spoken to Fedor about the Union at the November 10 happy hour which was the source of some of Fedor's complaints; the sudden urgency for Gibbons' discharge after Curtin spoke with Moniz and Fedor; Gibbons' otherwise ex-

emplary work record, Curtin's failure to interview other employees present or involved in the alleged harassment; and the decision to discharge Gibbons before speaking with him. We agree that the Board, with court approval, has not hesitated to infer an employer's knowledge of employees' protected activities where the circumstances reasonably warrant such a finding. See *Matthews Industries*, 312 NLRB 75, 76 (1993), and cases cited therein. We do not, however, find such circumstances in the instant case. While the Respondent's sudden decision to discharge Gibbons after a less than thorough investigation is suspect, the inference that Moniz or Fedor told Curtin about Gibbons' union activity is supported by no direct evidence of knowledge and only an inference of antiunion animus. We cannot conclude, in the absence of more substantial evidence of the Respondent's knowledge of union activity or antiunion animus, that the inference to be drawn from the circumstances of Gibbons' discharge rises above the level of mere suspicion.

Accordingly, we find, in this case, that the circumstantial evidence and inferences drawn from the totality of the facts fail to establish that the Respondent had knowledge of Gibbons' union activity and that his discharge was motivated by the Respondent's antiunion animus. We shall therefore dismiss the complaint.

ORDER

The complaint is dismissed.

Thomas Quigley, Esq., for the General Counsel.

Matthew T. Milkave and Michael R. Zeller, Esqs., of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

DAVID S. DAVIDSON, Administrative Law Judge. This case was tried in Hartford, Connecticut, on July 18-21, 1995. The charge was filed January 23, 1995, and the complaint issued on March 7, 1995. The complaint alleges that the Respondent discharged Jon Gibbons on January 4, 1995, because of his union and protected concerted activities. In its answer, the Respondent contends that it discharged Gibbons because he sexually harassed and/or assaulted female coworkers and denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the counsel for the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Connecticut corporation, is engaged as a not-for-profit agency providing services and programs to persons with developmental disabilities at its facilities in the Norwalk, Connecticut area. It annually derives gross reve-

⁶There is no allegation that this memo violated the Act.

nues in excess of \$250,000, and purchases and receives goods and materials valued in excess of \$5000 directly from points outside the State of Connecticut. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I find also that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Jon Gibbons' employment

The Respondent has six facilities in the Norwalk area. One of them, known as the STAR center houses the Respondent's top managers and contains a workshop for the disabled, referred to by the Respondent as participants. Jon Gibbons, the alleged discriminatee, was hired by the Respondent on February 27, 1990, to work as a production instructor at the STAR center. In March 1992, he was promoted to the position of production coordinator. His duties included coordinating the flow of work in and out of the workshop, assisting the receiving coordinator, demonstrating to production instructors how the work was to be performed, and checking the quality of the work. During the first year of his employment, when the Respondent was notified that Gibbons' application for a special driving license had been denied because of a prior felony conviction, the Respondent became aware that Gibbons had falsely stated on his employment application that he had no felony convictions. Although the Respondent viewed the matter seriously, its director of employment services, Kari Ryan (formerly Peterson), wrote a letter of recommendation in support of Gibbons' appeal from the denial, and the Respondent retained him when the appeal was granted. With the exception of one oral reprimand,¹ his employment record was exemplary from then until the events leading to his discharge. He received a majority of excellent ratings in annual evaluations, and was praised on several occasions for his performance. In September 1994, he was given additional duties and a wage increase. Clearly he was regarded as a valuable employee in a facility with a high rate of employee turnover.

2. Union activity

In late October 1994, Gibbons and employees Bill Legere and Shawn Weeks met with Union Representative Pearl Granat to discuss organizing the Respondent's employees. At the suggestion of Granat, the three employees began to sound out other employees about their interest in union representation. As advised by Granat, they sought to keep their union activity a secret, while speaking to 8 to 12 of their coworkers. Among those they spoke to were production instructors Angelina Moniz and Kathy Fedor. Gibbons and Legere spoke

to Fedor about the Union at a "happy hour" on November 10, 1994.² At a second meeting with a union representative in mid-December, Gibbons, Legere, and another employee who was present decided to postpone efforts to distribute authorization cards until after a scheduled Christmas shutdown and to continue to keep their activity a secret until then.

3. Complaints about Gibbons

On December 15, 1994, at a STAR Christmas party, Moniz was seated next to Director of Employment Services Ryan and mentioned to Ryan that Gibbons made her feel uncomfortable. Ryan asked Moniz if she wanted to talk about it, and Moniz said that she did but not at that time or place.

On December 21, Ryan called Moniz in to pursue what Moniz had said. Moniz complained that Gibbons had given her and others the impression that he was the supervisor of the workshop and that all problems should be brought to him before they were discussed with Workshop Supervisor Dale Allen. She said that 5 or 6 months earlier she had complained to Allen about the problems she was having with Gibbons and had learned that Gibbons was not her supervisor. She also complained about gossip and distortions by Gibbons concerning the staff and situations in the workshop and said that she believed that Allen had spoken to Gibbons about her complaints. Moniz had difficulty describing the discomfort which Gibbons caused her beyond stating that Gibbons picked on her and that he tried to get her to go out with him, but she also said that he had made no outward sexual advances to her. She mentioned the incident at a happy hour at which Gibbons had lifted her up from a bar stool and had talked to her in ways that made her uncomfortable. Moniz said that after that she had stopped attending happy hours. Moniz mentioned that Fedor was having similar problems with Gibbons and suggested that Ryan speak with Fedor.

Ryan then called Fedor in and asked her about her impressions of Gibbons. Fedor told Ryan about the November 10 happy hour at Bobby Valentine's restaurant. In the course of her description she identified maintenance man Mike Aponte, his wife Annie, and instructor Bill Legere as others who were present. Fedor stated that she had become upset when she learned from speaking with Annie Aponte that Annie knew a lot of information about her, which she later indicated came from Gibbons. Fedor told her that during the course of the evening Gibbons made physical advances toward her. Fedor said that in one instance Gibbons went under the table, spread her legs, and "dove in." Fedor kicked him away and angrily told him to stop. Later, she said that he grabbed one of her breasts and bit the other. She angrily told him to stop. After that she heard Gibbons tell Legere that she had "hard nipples." Fedor said that she grew more upset and told him he shouldn't be doing those things and was making her uncomfortable. Fedor said that he grabbed her thigh, pulled her to him, and told her that she knew he wanted her from the beginning.

Fedor told Ryan that Gibbons had told her that he was the supervisor of the workshop and that she was to discuss everything through him and not Allen. Fedor said that she later learned from Moniz that Gibbons was not a supervisor, but

¹ Although Ryan testified that after two separate complaints by employee Angelina Moniz she instructed Gibbons' supervisor, Dale Allen, to speak to Gibbons, Moniz testified that she complained only once before December 15, 1994. Allen did not testify. From Moniz' testimony as well as Gibbons' testimony concerning a statement by Allen at Gibbons' termination interview, I conclude that Allen spoke to him on one occasion as a consequence of a complaint by Moniz. The record does not establish when that happened, but it appears that it was at least 4 or 5 months before Gibbons' termination.

² From time to time, employees organized and met at "happy hours" after work at nearby restaurants or bars.

that she had believed that he was at the time of the happy hour at Valentine's. Fedor said that she had been to one happy hour since the one at Valentine's but would not go again if there was a possibility that Gibbons might be there. She said that at the second happy hour he again made sexual advances toward her.

Fedor told Ryan that at work Gibbons sometimes was pleasant to her, but sometimes had been rude and nasty, using foul language. She also said that at work he had not made outward sexual advances to her or tried to touch her, but he had asked her out and made her feel uncomfortable.

Ryan consulted with Dale Allen who supervised Gibbons and the production instructors. Ryan asked Allen if he was aware of complaints about harassment. Allen said that he knew only of Moniz' complaints that Gibbons had represented himself as a supervisor and had assigned her a false deadline. After speaking with Allen, Ryan spoke with employee Kathy Drucker because Allen had said that Drucker did not want Gibbons assigned to her work crew. Drucker told Ryan that Gibbons had asked her out, tried to pass himself off as her supervisor, gave her special jobs to do, and spread false gossip. Drucker also said that he had not made sexual advances or touched her but intimidated her and made her feel uncomfortable. Drucker asked that what she had said be kept confidential as she feared retaliation.

Ryan consulted with Executive Director Katie Banzhaf and Director of Personnel Irene Curtin, who was at home ill. They decided that Ryan would write a report of what she had learned for Curtin, and that Curtin would take up the matter on her return after the shutdown which was scheduled to start the next day and continue until January 3. Ryan was going on vacation and was not scheduled to return until a week later. Banzhaf also suggested to Ryan that she speak to other women about Gibbons' conduct in the workplace. Ryan was able to speak to one other woman, Jennifer Brown, who told Ryan that she never had any confusion about the identity of her supervisor and that she had never been intimidated or made to feel uncomfortable by any one at work. Ryan did not interview Legere, Aponte, or Gibbons.

Ryan prepared a memo to Curtin summarizing her interviews with the four women, which concluded as follows:

I am very concerned that Jon appears to have intimidated three women at STAR, and has misrepresented himself as a supervisor despite being told otherwise by Dale. He has misused the responsibility we have given him in the past, and I am recommending that action be taken regarding this.

On January 3, Curtin reinterviewed Moniz and Fedor and asked each of them to verify what Ryan had written in her report and to write or sign additional statements setting forth things they told Curtin which did not appear in the report. Moniz added that Gibbons made comments to her at work such as, "Is it that time of the month," and that she felt that Gibbons was constantly "hitting on her," making her feel so uncomfortable. The additional statement that she signed stated that she told him that she was married and not interested in him. She also said that Gibbons made her do work which was supposed to be his which she had discussed with Allen who had put a stop to it.

Moniz also told Curtin that she had overheard Gibbons tell a participant in the workshop, "Ricky, pull out your penis." and that Gibbons often sat on participants' laps and wiggled his rear. She identified a production instructor as a possible witness to the former and the names of two participants on whom Gibbons allegedly sat.

Fedor added several incidents to what Ryan had reported. She told Curtin that when she first started to work in September 1994, Gibbons tried to make her believe that he was the boss and told her to stay away from Moniz because she was two-faced and "a bitch." On another occasion when she felt that Gibbons had ignored her, she asked Gibbons if she was "invisible." Gibbons said to Sean Weeks who was with him, "Oh she must be on the rag," and Weeks said, "Oh women problems." When she went to ask Gibbons a question, he would always ask, "Are you feeling better," and she would say that she was fine and not sick. He would say that it was because she was so crabby the previous week and ask if it was that time of the month and "Are you on the rag again?" She said that he never touched her, but just said things. In her statement she wrote, "He did all the touching when we were out of Star. It was all verbal intimidation."

Curtin did not interview Gibbons, Aponte, Legere,³ or any other men or women employed in the workshop.

4. Gibbons' termination

On January 4, Gibbons remained home because of illness. Curtin called him at home and told him that he needed to come to work immediately. Gibbons told her that he was too sick to come in, and asked why it was necessary. Curtin did not say, but told Gibbons that if he did not come in he would be suspended without pay. Gibbons went to the facility and met with Curtin and Allen. According to Curtin, she informed him that he had been accused of harassing coworkers, some sexually, and that he would be fired unless he could explain his conduct. According to Gibbons, Curtin told him that he was being fired for harassing his coworkers. Gibbons denied harassing anyone. Curtin read off a list of some of the accusations and asked Gibbons if he had engaged in the conduct. Gibbons denied each allegation. At one point when Curtin mentioned setting false production goals, Gibbons denied it, but Allen reminded him that he had received a complaint about that.

According to Gibbons, Curtin refused to tell Gibbons who his accusers were or what they said, but she told him that they had a couple complaints, some of them sexual, and that if it had been only one, they would work around it, but since it was more than one, they were going to terminate him unless he chose to resign, in which case they would give him a letter of recommendation. She said that since they thought he was a valued employee, they wanted to see that he continued to be gainfully employed. Gibbons refused to resign, and Curtin handed him a termination slip and a final check which had been prepared in advance.

5. Posttermination events

The next day Gibbons appeared outside the facility and picketed with a sign that read, "STAR sucks." On that day

³ Legere had given notice of his intention to quit before the shutdown, and January 3 was his last day of work.

another employee, Pat Specscha, told Curtin that Gibbons had told him that he was fired for trying to organize a union.

Gibbons filed a claim for unemployment compensation, which STAR opposed. For that proceeding, the Respondent had Ryan's report and the statements of Fedor and Moniz notarized and obtained additional sworn statements from them. Gibbons' claim was granted. The Respondent sought to appeal, but its appeal was rejected as untimely.

In the statement obtained from Moniz after Gibbons' termination, she expanded on the consequences of her impression that he was her supervisor and described an incident in which Gibbons contributed to creation of tension between her and Fedor. She also described in greater detail incidents at work after the happy hour that was mentioned in Ryan's report. She stated that Gibbons would throw work materials at her, would set off participants to make them upset, and would give her "the finger." She also stated that he "would point at his crotch and say to me, 'Do you want this?'" Moniz stated that his behavior was stressful to her and that she had cried at work and at home because of it.

The additional statement signed by Fedor covered the material in her previous statements, added new detail, and introduced new elements. In describing the happy hour at Valentine's for the first time she mentioned that Gibbons had said that she and Abby Santos were lesbians. She also stated that later while she was talking about her childhood in Puerto Rico, Gibbons appeared to be taking notes which he later passed around but would not show her. When she grabbed it from Mike Aponte, she saw that written on it was "Kathy fuck me in the ass Fedor," a bunch of numbers, and "big Bitch." She stated that on the following Monday, she brought the note with her and showed it to Jennifer Kaye and Legere. Legere took it into the men's room to show Gibbons. When they returned they were laughing, and she asked Legere to return it because she wanted to keep it. She also mentioned receiving complaints by Gibbons about her work and assignments from Gibbons which she later learned from Allen were not her responsibility. She mentioned the incident which Moniz had also described, portraying Gibbons as instigating friction between them. She also stated that when Gibbons spoke to her about work, he would sit very close to her, thigh to thigh, with his leg always touching hers. Finally, she attributed a number of statements to him at work with sexual innuendo.

On February 8, 1995, after the charge in this case was filed, STAR distributed a memo to all employees advising them that management had just been informed by the Board that the Union had filed a charge claiming that an employee had been discharged for union activity, that it was untrue, and that a charge of that type was usually a signal that an employer was the target of an organizing drive. The memo further stated that management did not believe that there was a need for a union at STAR, that the employees had been treated well without one, and that authorization cards were the first step to union membership with its obligations and burdens. The memo also informed employees that they had the right not to sign cards and to obtain the return of cards which had been signed. There is no allegation that this memo violated the Act.

B. Concluding Findings

Much of the testimony in this case concerns the incidents about which Moniz and Fedor complained and raises a number of credibility issues. A substantial portion of the testimony relates to the November 10 happy hour and what did or did not happen there. I am not persuaded that the testimony of any of the witnesses who were present at the happy hour is entirely accurate or truthful. Bearing in mind that the group remained at Valentine's for several hours during which there were pitchers of beer or stronger drinks consumed, it may be asking the impossible to expect to be able to reconstruct the events of the evening faithfully from anyone's testimony.

Of the two directly involved in the events at issue, I find that Gibbons tended to downplay and gloss over what happened, particularly at the happy hour, while Fedor tended to exaggerate them and omit her own active role in them. Gibbons testified in only the most general terms as to the conversation during the evening, referring to it as lighthearted joking around, denying any sexual harassment and specific acts of harassment attributed to him but claiming not to recall other events of the evening which others recalled and which were related to the conduct attributed to him. It is possible that Gibbons' memory of the evening was impaired by alcohol, but I am inclined to believe that Gibbons was less than candid in his denials of memory and that he remembered enough to require some explanation which he sought to avoid. Legere's testimony, particularly as to the note writing that Fedor referred to in her postdischarge statement, lends support to the conclusion that the joking around that Gibbons described as lighthearted was sexually suggestive if not totally obscene. However, some of Gibbons' testimony, particularly that he was dissatisfied with the work of Moniz and Fedor and had complained to Allen about them, was uncontradicted and gives a basis to believe that both resented him for reasons other than the conduct they complained about.

I am also persuaded that Fedor exaggerated some of Gibbons' conduct and presented a distorted picture of her own conduct and feelings during the course of the evening of November 10. The testimony of Legere portrayed Fedor as a willing participant in the note writing, and he and the others gave a different version from hers of the conversation about Abby Santos. Despite Fedor's vivid testimony about both, neither the note nor Santos was mentioned in Ryan's report or in what Fedor added to it on January 3. Those allegations were mentioned for the first time in the statement given by Fedor for the unemployment compensation proceeding after Gibbons' discharge. These incidents, and particularly the incident involving the note, were if anything more offensive than some of the things that were included in the earlier statements. Their omission from the predischarge statements indicates to me that they were not mentioned to Ryan or Curtin until after Gibbons was terminated when the Respondent was seeking to bolster its justification for the termination before the unemployment compensation commission and that Fedor shaped her version to suit that purpose.

Other indicia that Fedor's version suffers from distortion are that Fedor remained at the restaurant for several hours despite her claim that she was repeatedly subjected to unwelcome verbal and physical abuse. Also, the seating arrangement at the restaurant, the size of the tables, and Gibbons'

size makes it virtually impossible that Gibbons "dove" in as Fedor testified and described to Ryan. Finally, there is a significant deviation between Fedor's handwritten statement on January 3 and her posttermination statement. Thus, Ryan's report stated that Gibbons had not "made outward sexual advances [to Fedor] and has not tried to touch her at work." On January 3, Fedor stated, "But he would never touch me, he would just say things[;] he did all the touching when we were out of STAR. It was all verbal intimidation." Yet on January 18 she stated, "When talking to me about work, Jon would sit real close to me. He would sit thigh to thigh. His leg always touched mine. I would move away."

I conclude that by the time Fedor reported these incidents, she had substantially censored her own role in them and distorted the conduct of Gibbons and Legere. An important aspect of Fedor's complaint about Gibbons' conduct at the happy hour was her claim that Gibbons had told her that he was her supervisor and that she had not yet learned that this was untrue. Legere testified that he had told Fedor before November 10 that Gibbons was not a supervisor. Unlike Moniz who assumed that Gibbons was her supervisor, according to Fedor, Gibbons deliberately sought to mislead her by telling her that he was her supervisor. Whatever impression Fedor may have formed, I doubt that Gibbons told her that he was her supervisor, particularly after Allen reportedly spoke to Gibbons about Moniz' complaint, and I credit Legere that he disabused Fedor of any impression she may have formed before the events at issue.

In any event, the outcome of this case does not depend on determining what actually happened either at the November 10 happy hour or in the other incidents that Moniz and Fedor told Ryan and Curtin about. Rather it depends on a determination of what Ryan, Curtin, and Banzhaf knew and believed and why they decided to terminate Gibbons.

Counsel for the General Counsel contends that the Respondent had no reason to rely on Moniz' complaints about Gibbons and that Fedor's story was ridiculous on its face. He contends further that from the failure to investigate fully the complaints about Gibbons, the decision to discharge him before even speaking to him, the fact that he had been an exemplary employee, and the timing of his discharge in relation to union campaign that was about to begin, the inference should be drawn that he was discharged because of his union activity. The Respondent contends that the General Counsel failed to establish a prima facie case because there is no evidence that the Respondent knew of Gibbons' union activity until after he was terminated, there is no evidence of antiunion animus, and the General Counsel failed to establish that the reasons given for Gibbons' discharge were not the true reasons.

The investigation which led to Gibbons' discharge started when Moniz complained to Ryan at the Christmas party. In Ryan's initial handling of their complaints and the report she wrote to Curtin there is nothing to indicate that Ryan had any purpose other than to deal with the complaints of Moniz and Fedor. Ryan's delay in investigating Moniz' complaint is explained by the priority Ryan gave to other work and obligations. If anything, the delay indicates that initially the Respondent proceeded deliberately and not with the haste that might be expected when an employer is looking for a pretext to get rid of a union activist in order to frustrate union activity.

To the extent that Ryan's report corroborates her testimony as to what she did to investigate the charge and what she was told, I credit Ryan. I believe that the report fairly reflects what Moniz told Ryan as understood by Ryan. Counsel for the General Counsel contends that Moniz' testimony that she believed for some time that Gibbons was her supervisor is not worthy of belief in view of Moniz' previous work experience and that fact that Jennifer Brown had no similar confusion. Ordinarily I would expect that an employer would make it clear to a new employee who her supervisor was and I would be skeptical of Moniz' testimony. Yet on this record there is basis to believe that Gibbons' duties made his status unclear and that the Respondent failed to clarify it for new employees. Legere testified that shortly after he started work in August he asked Moniz if Gibbons was a supervisor and that she told him that Gibbons was not. According to Legere, Fedor also asked him whether Gibbons was a supervisor before the November 10 happy hour. His testimony establishes that he and Fedor were both uncertain about Gibbons' status after they started to work and found it necessary to ask about it. Moniz did not testify that Gibbons ever told her that he was a supervisor; rather she testified that she assumed that he was a supervisor. I credit her in that respect. As Ryan was aware that Moniz had complained to Allen about it previously, there was also no reason for Ryan to have disbelieved Moniz when she repeated the same complaint to her.

However, the testimony of Moniz and Ryan includes details which were omitted from Ryan's report, but which appear in later written statements obtained from Moniz. I have concluded that those details were not likely to have been omitted from Ryan's report if she was aware of them when she wrote it and that they were not mentioned until the statements in which they appear were given. In addition, there are inconsistencies between Moniz' testimony and what appears in the statements as well as between what appears in Ryan's report and the later statements. Ryan's December 22 report states that Gibbons reportedly has not touched her at work or made "outward sexual advances." Despite the implication in the statement that Curtin wrote on January 3 that Gibbons was constantly "hitting on her" sexually, Moniz testified that "hitting on" meant to her picking on her constantly, "Like teasing and things like that," and nothing sexual. However, the January 19 statement signed by Moniz she stated that at work Gibbons "would point to his crotch and say to me, 'Do you want this?'" She testified to the same effect and that she answered that she had what she wanted at home. She also testified that she did not take it as a joke. Even allowing for the fact that Moniz may have some language difficulties, I do not believe that these inconsistencies are the product of linguistic confusion.

I find no reason to doubt that on December 21 Fedor told Ryan the story that Ryan included in her report or that Ryan included in her report all the significant details which Fedor told her at that time. Counsel for the General Counsel urges that Ryan should have dismissed the story she told Ryan as ridiculous or ludicrous on its face because everything that Fedor described at the November 10 happy hour took place in the presence of Aponte, his wife, and Legere, who knew Gibbons and his wife and that Fedor's description of Gibbons diving under the table, attempting to spread Fedor's

legs apart, and thrusting his head between them was simply unbelievable.

Although Ryan testified that on conclusion of her investigation she believed what Moniz and Fedor had told her and recommended to Banzhaf and Curtin that Gibbons be discharged if what the women said was true, a reading of her report does not square with her testimony that she had accepted their stories as true. Ryan's investigation was not complete. None of the others present at events referred to in the report had been questioned. The report states that in their most recent conversation, Banzhaf suggested that she interview other females who previously worked in the workshop to see if they had concerns and that she had an opportunity to speak to one staff person who did not. The report repeatedly uses words like "reportedly" and "alleged." The report ended with a statement of concern that Gibbons "appears to have intimidated three women at STAR" and a recommendation that unspecified "action be taken regarding this." Thus the substance, tone, and the nature of the action recommended indicate that Ryan did not view the investigation as complete and that it was written by some one who had not yet reached a conclusion. I believe that her report, which was written contemporaneously with the events, more accurately reflects her conclusions and recommendation than the testimony.

The recommendation for unspecified "action" was a reasonable reaction to what Ryan had heard from Moniz, Fedor, and Drucker. All three had told her that Gibbons made them feel uncomfortable based on conduct in the workshop, and two of them complained of conduct away from it as well. Certainly pursuit of their complaints was warranted. But there was no clear indication of where that investigation might lead. Moniz' and Drucker's complaints related in large part to past events which had already been dealt with, and there was enough vagueness in Moniz' current complaint to want to know more about its basis. Allen, who supervised Gibbons and the others, was unaware of any harassment in the workplace. Fedor's complaints, particularly about the happy hour, warranted talking to others who were there, and Drucker's reticence to be identified as a source of complaint, as well as the nature of her complaints, raised questions as to the objectivity of what she reported, particularly in the light of Brown's statement that she had no confusion about who her supervisor was and that she had never been intimidated.

Allen's unawareness of any harassment is of particular significance, for as Allen was the direct supervisor of the production instructors with whom Gibbons interacted, one would expect that he would be aware of problems involving Gibbons and the others, particularly after Moniz had complained to him several months before and he had spoken to Gibbons about her complaints. At the very least, what Ryan was told called for the action that Banzhaf had suggested, talking to other women who worked in the area, before deciding on any discipline.

When Curtin resumed the investigation after the Christmas shutdown, she began as if she were going to conduct a thorough investigation of her own. She reinterviewed Moniz and Fedor and added information from them to that which Ryan had reported. Moniz' additional statements added two elements that gave both more currency to her complaints and added a sexual element to their nature. The questions attrib-

uted to Gibbons about the time of the month have a clear reference to the menstrual cycle, and the statement which Curtin wrote and Moniz signed suggested that Gibbons' "hitting on" Moniz was also sexual in nature. However, what Curtin wrote and Moniz signed differs from Moniz' testimony that "hitting on" her meant picking on her and teasing her and from what appeared in Ryan's report which Moniz read and signed at the same time.

The information that Fedor added to her earlier statement bore some relationship to what Moniz had added, as Fedor also reported that Gibbons taunted her frequently about being "on the rag" and other references to her menstrual cycle. However, Fedor also stated that Gibbons' conduct at work was all verbal and that he never touched her while at work. Both Moniz and Fedor named others as present at incidents they described, and Moniz described incidents suggesting possible abuse of participants.

Curtin's investigation ended as did Ryan's without talking to Gibbons, with those named in the statements of Moniz and Fedor, or with any one else who might have independent knowledge of Gibbons' conduct. Although Moniz' statement raised the possibility of participant abuse, those aspects of the statement were not pursued either before or after Gibbons' termination. Fedor's statement also indicated that another employee joined in when Gibbons taunted her about being "on the rag." His participation was also never pursued.

Curtin testified that Moniz and Fedor appeared to be sincere, that she could see no reason why they would have lied, and that Gibbons' past misrepresentation on his employment application gave her cause to doubt his veracity. She and Banzhaf testified that based on what the women had told Ryan and Curtin and after reviewing the employee handbook, they decided that Curtin should call Gibbons in and discharge him unless he could give some reason why Fedor and Moniz might have lied and made up these stories about him.

There is a major conflict between Curtin's and Gibbons' testimony as to what happened after he came in response to Curtin's call. According to Curtin, she carried out the decision that she and Banzhaf had reached and did not decide to terminate Gibbons until after he had failed to give her any reason why Moniz and Fedor would have made up their stories or some acceptable explanation for the conduct they attributed to him. However, Curtin admittedly never identified to Gibbons the women whose stories he was expected to refute. According to Gibbons, when he arrived in Curtin's office she said that he was called in because "we're going to fire you for harassing your co-workers." and he was given no chance to avoid discharge other than by resigning.

I have credited Gibbons as to what he was told on January 4. Although Allen, an admitted supervisor, was the only other person present in Curtin's office when Gibbons came in, he was not called as a witness to corroborate Curtin. The admitted failure of Curtin to identify Gibbons' accusers because of a claim of confidentiality is hardly consistent with Curtin's claim that he could have saved his job by explaining why they would have made up the stories they told her. Finally, although Curtin claimed to have read a list of allegations from Ryan's report and the statements of Moniz and Fedor, she testified that one of the things she asked him was whether he had ever pointed to his crotch and said to an employee "I know you want this." Yet this allegation was not

in any statement in Curtin's possession at the time and first appeared in Moniz' January 18 statement given after Gibbons' discharge. I do not credit Curtin as to what she told Gibbons, nor do I credit Curtin or Banzhaf as to what they decided before Gibbons was called in.

The decision to discharge Gibbons without confronting him, identifying his accusers, seeking his version or explanation, or speaking to any of the others who might have shed light on the allegations of Moniz and Fedor, warrants the inference that the truth of the reasons given Gibbons for his termination was unimportant and that they were not the reasons for his discharge. While Gibbons may have lied about a serious matter on his employment application, Gibbons had been an exemplary employee, highly rated, praised, and promoted, and his longevity in the job had to have been prized in an occupation in which stress was high and turnover frequent. The Respondent had given him the benefit of the doubt when it hardly knew him and when it was clear that he had lied. Now, when Curtin and Banzhaf knew him much better they decided to terminate him without even hearing from him. Curtin's offer to Gibbons of a good recommendation if he resigned because he had been a good employee is a further indication that the Respondent was indifferent to the merit of the charges against him. If the reasons told Gibbons for his discharge were true, the recommendation could not be an honest one, and the offer itself suggests that the Respondent expected trouble from Gibbons which it sought to avoid. Indeed, Curtin and Banzhaf considered the possibility that Gibbons might sue the Respondent for unjust dismissal. Yet despite that belief, he was discharged without a complete investigation which might have established whether his dismissal was unjust.

The Respondent contends that Gibbons was discharged for sexual harassment pursuant to policies set forth in its handbook and sexual harassment policy and relies heavily on Gibbons' conduct at the November 10 happy hour. However, neither the handbook nor the sexual harassment policy required discharge. According to Banzhaf, Gibbons was discharged for sexual harassment and intimidation, and she testified that sexual harassment applied only to Fedor and that they were more concerned about what happened at the workplace than away from it. According to Curtin, Gibbons was discharged for sexual harassment. However, she also testified that the transgressions against Moniz were not of a sexual nature and that she focused more on the things that happened at the workshop than at the happy hour. Thus, their testimony downplays the importance of the events at the happy hour and limits the allegations of sexual harassment. With respect to Moniz and Drucker, much of their complaint concerned conduct which had already ended and for which Gibbons had been orally reprimanded without any notation in his employment record. Although the allegations of sexual harassment and intimidation triggered the investigation started by Ryan, I am persuaded that those allegations became superseded by other considerations when Banzhaf and Curtin decided to terminate Gibbons even before Curtin had heard from him.

As the Board stated in *Pace Industries*, 320 NLRB 661 (1996):

Having discredited the Respondent's explanations for its actions, the judge [is] entitled to infer that there was

another reason, but it does not necessarily follow that the real reason was grounded in antiunion animus. Those explanations might have been offered in an attempt to conceal a violation of some other statute instead of the Act, or a motive that may have been base but not unlawful at all. Consequently, we reject any suggestion that the "inconsistencies, contradictions, improbabilities and aberrational and shifting explanations" in the testimony of the the Respondent's witnesses "necessarily compel" the conclusion that the the Respondent's true motive in implementing those processes was discriminatory within the meaning of the Act. [Footnotes omitted.]

Here, while there is no evidence of any other conduct that violated the Act, there is evidence in the memo to employees distributed a month after Gibbons' discharge that the Respondent was opposed to union representation of its employees and sought actively to discourage its employees from supporting the Union.⁴ What is lacking is any direct evidence that the Respondent was aware of any union activity among its employees. While knowledge may be inferred, there must be some basis for the inference.⁵

When Ryan completed her report to Curtin, there seemed to be no urgency to the matter. She recommended further action, but the tone of her report made it clear that she had neither accepted nor rejected the stories she had been told by Moniz and Fedor and that in response to Banzhaf's suggestion she had only had a chance to speak to one other woman who worked in the workshop. Her testimony also establishes that they intended to speak with Gibbons but postponed interviewing him because of the pending Christmas holiday. However, after Curtin spoke with Moniz and Fedor, Gibbons' termination became so urgent that no other employee was interviewed, and although Gibbons had called in sick, he was told that he would be suspended if he did not come in immediately.

The only thing that happened relative to Gibbons' discharge between December 23 and January 4 was that Curtin interviewed Moniz and Fedor. Both knew of Gibbons' union activity, and Gibbons had spoken to Fedor about the Union at the November 10 happy hour which was the source of some of Fedor's complaints and which was a subject of discussion between Curtin and Fedor on January 3. Given the sudden urgency for Gibbons' discharge, the opportunity for Curtin to learn of Gibbons' union activity in her conversations with Moniz and Fedor, his exemplary work record up to this point, the decision to discharge Gibbons before even speaking with him, and the failure to speak to any of the other employees who were present or involved in any of the conduct attributed to him, the explanation which presents itself is that Curtin learned of his union activity on January 3 in the course of her interviews and that his union activity became the reason for his immediate discharge. I conclude that the General Counsel has met the burden of persuasion that the Respondent's antiunion sentiment was a motivating factor in the Respondent's decision to discharge Gibbons, and having rejected the reasons offered by the Respondent,

⁴ *American Packaging Corp.*, 311 NLRB 482 fn. 1 (1993).

⁵ *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046, 1049 (1985); *Metro Center, Inc.*, 267 NLRB 288 (1983); and *Wal-Mart Stores*, 201 NLRB 250 (1973).

that it would not have taken the same action in the absence of the union activity.⁶ Accordingly, I conclude that Gibbons' discharge violated Section 8(a)(3) and (1) of the Act.

CONCLUSION OF LAW

By discharging Jon Gibbons because of his union activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged Jon Gibbons, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

⁶See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).